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8 UNITED STATES DISTRICT COURT  
9 FOR THE EASTERN DISTRICT OF CALIFORNIA  
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11 STEVEN MCVAY,  
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13                                      Petitioner,  
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15                                      v.  
16 STEVEN MERLAK,  
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18                                      Respondent.  
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Case No. 1:20-cv-00486-JDP

ORDER REQUIRING RESPONDENT TO  
RESPOND TO PETITIONER'S REQUEST  
FOR A TEMPORARY RESTRAINING  
ORDER

ORDER REGARDING CONVERSION OF  
PETITION FOR WRIT OF HABEAS  
CORPUS TO CIVIL RIGHTS ACTION  
UNDER 42 U.S.C. § 1983

ECF No. 1

ORDER DIRECTING CLERK TO SEND  
PETITIONER § 1983 COMPLAINT FORM

21            Petitioner Steven McVay, a federal prisoner without counsel, seeks a writ of habeas  
22 corpus and a temporary restraining order under 28 U.S.C. § 2241. ECF No. 1. This matter is  
23 before us for preliminary review under Rule 4 of the Rules Governing Section 2254 Cases. *See*  
24 R. Governing § 2254 Cases 4; 28 U.S.C. § 2243. Under Rule 4, a district court must dismiss a  
25 habeas petition if it “plainly appears” that the petitioner is not entitled to relief. *See Valdez v.*  
26 *Montgomery*, 918 F.3d 687, 693 (9th Cir. 2019); *Boyd v. Thompson*, 147 F.3d 1124, 1127 (9th  
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28

1 Cir. 1998). Petitioner sole request for relief is a temporary restraining order against his prison to  
2 prevent his transfer to a different prison facility. ECF No. 1.

### 3 **Discussion**

4 Petitioner states that the Taft Correctional Institution, where he is imprisoned, will be  
5 closing on April 30, 2020. ECF No. 1 at 2. As a result, all prisoners at Taft were notified that  
6 they will be moved to other prison facilities at that time and they will not be notified of their new  
7 placement until they are in transit to that placement. *Id.* Petitioner bases his request on the  
8 outbreak of the COVID-19 virus—he states that he is 71 years old, elderly and frail, and faces  
9 potential death if exposed to the virus. *Id.* at 2, 3. Petitioner states that he is scheduled to be  
10 released in August 2020 under the elderly offender program. *Id.* at 3. Petitioner states that there  
11 are no known cases of COVID-19 at Taft, but that many of the potential placement prisons for  
12 Taft inmates have staff and/or inmates infected with the virus. Therefore, petitioner requests that  
13 we order his prison to refrain from transferring him to a different facility until either the COVID-  
14 19 virus is contained or until he has finished serving his sentence. *Id.* at 4.

15 First, due to the time-sensitive nature of petitioner’s motion for a temporary restraining  
16 order, we will order respondent to respond expeditiously to petitioner’s motion. Respondent  
17 should respond within five days of the date of entry of this order and address both the merits of  
18 the motion and any procedural issues that may bar relief. The response need not be lengthy.  
19 Petitioner may have five days to file a reply, if any, after the response is filed.

20 Second, because petitioner’s habeas request for relief is limited to the conditions of his  
21 confinement, we will require petitioner to notify us whether he would like to continue with his  
22 action as filed or, rather, seek relief under 28 U.S.C. § 1983. “Challenges to the validity of any  
23 confinement or to particulars affecting its duration are the province of habeas corpus; requests for  
24 relief turning on circumstances of confinement may be presented in a § 1983 action.”  
25 *Muhammad v. Close*, 540 U.S. 749, 750 (2004); *see Greenhill v. Lappin*, 376 F. App’x 757, 757-  
26 58 (9th Cir. 2010) (holding that the appropriate remedy for a federal prisoner’s claim that relates  
27 to the conditions of his confinement is a civil rights action under *Bivens v. Six Unknown Named*  
28 *Narcotics Agents*, 403 U.S. 388 (1971)). Claims concerning various prison conditions brought

1 pursuant to § 2241 have been dismissed in this district for lack of subject matter jurisdiction with  
2 indications that an action pursuant to *Bivens* is appropriate.<sup>1</sup>

3 Here, petitioner has neither claimed that he is in custody in violation of federal law, nor  
4 that the duration of his sentence violates federal law. Rather, he seeks an order preventing his  
5 transfer to another facility, which is a request turning on the circumstances of his confinement.  
6 Therefore, habeas relief is not proper here. However, petitioner may seek relief by converting  
7 this case from a petition for habeas corpus to a civil rights action under 28 U.S.C. § 1983.

8 Petitioner may convert a habeas petition to a § 1983 complaint. *See Nettles v. Grounds*,  
9 830 F.3d 922, 936 (9th Cir. 2016) (“If the complaint is amenable to conversion on its face,  
10 meaning that it names the correct defendants and seeks the correct relief, the court may  
11 recharacterize the petition so long as it warns the *pro se* litigant of the consequences of the  
12 conversion and provides an opportunity for the litigant to withdraw or amend his or her  
13 complaint.”). Because petitioner is unrepresented, we must further warn him of the consequences  
14 of conversion. *See Nettles*, 830 F.3d at 936. Habeas corpus and prisoner civil rights actions  
15 differ in a variety of respects, such as the proper defendants, filing fees, exhaustion requirements,  
16 and restrictions on future filings (e.g., the Prison Litigation Reform Act’s three-strikes rule).  
17 *Nettles*, 830 F.3d at 936 (citing *Robinson v. Sherrod*, 631 F.3d 839, 841 (7th Cir. 2011)). If  
18 petitioner chooses to convert the instant matter to a civil rights action, the filing fee for § 1983  
19 civil rights cases is \$350. Petitioner will be required to pay the full amount by way of deductions  
20 from income to his trust account, even if he is granted *in forma pauperis* status. *See* 28 U.S.C.  
21 § 915(b)(1).<sup>2</sup>

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22 <sup>1</sup> *See, e.g., Burnette v. Smith*, No. CIV S-08-2178 DAD P, 2009 U.S. Dist. LEXIS 20219 at \*1 (E.  
23 D. Cal. Mar. 13, 2009) (petitioner’s confinement in segregated unit for security purposes and  
24 prison’s refusal to transfer petitioner should be raised as *Bivens* action, not as § 2241 habeas  
25 action); *Evans v. U.S. Penitentiary*, No. 1:07-CV-01611 OWW GSA HC, 2007 U.S. Dist. LEXIS  
26 87181, at \*1 (E.D. Cal. Nov. 27, 2007) (petitioner is not entitled to habeas relief under § 2241  
27 because his claims regarding a recent transfer and inadequate medical care concern conditions of  
28 his confinement); *Blow v. Bureau of Prisons*, No. 1:07-CV-01119 OWW NEW (DLB) HC, 2007  
U.S. Dist. LEXIS 60881, at \*1 (E.D. Cal. Aug. 20, 2007) (habeas relief under § 2241 does not  
extend to petitioner’s requests for transfer to another facility because it concerns conditions of his  
confinement).

<sup>2</sup> The court notes that petitioner has not been authorized to proceed in forma pauperis in this case.

1 If petitioner wishes to convert his petition to a § 1983 complaint, he may wish to amend  
2 his petition so that he may more thoroughly explain his § 1983 claim. The Eighth Amendment’s  
3 prohibition of cruel and unusual punishment requires that prison officials take reasonable  
4 measures for the safety of inmates. *See Farmer v. Brennan*, 511 U.S. 825, 834 (1994). A prison  
5 official violates the Eighth Amendment when two requirements are met: (1) the deprivation  
6 alleged is, objectively, sufficiently serious, and (2) the official is, subjectively, deliberately  
7 indifferent to the inmate’s safety. *See id.*

8 To satisfy the first prong, the inmate must show that he is incarcerated under conditions  
9 posing a substantial risk of serious harm. *See id.* “The Constitution ‘does not mandate  
10 comfortable prisons.’” *Id.* at 832 (1994) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 349  
11 (1981)). To satisfy the second prong, the official must know of and disregard an excessive risk to  
12 inmate safety. *See Farmer*, 511 U.S. at 837. The official must both be aware of facts from which  
13 the inference could be drawn that a substantial risk of serious harm exists, and he must also draw  
14 the inference. *See id.*

15 Should petitioner choose to amend the complaint, the amended complaint should be brief,  
16 Fed. R. Civ. P. 8(a), but must state what each named defendant did that led to the deprivation of  
17 petitioner’s constitutional or other federal rights. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009);  
18 *Jones v. Williams*, 297 F.3d 930, 934 (9th Cir. 2002). Petitioner must set forth “sufficient factual  
19 matter . . . to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 678 (quoting  
20 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). There is no *respondeat superior*  
21 liability, and each defendant is only liable for his or her own misconduct. *See id.* at 677.  
22 Petitioner must allege that each defendant personally participated in the deprivation of his rights.  
23 *Jones*, 297 F.3d at 934 (emphasis added). Petitioner should note that a short, concise statement of  
24 the allegations in chronological order will assist the court in identifying his claims. Petitioner  
25 should name each defendant and explain what happened, describing personal acts by the  
26 individual defendant that resulted in the violation of petitioner’s rights. Petitioner should also  
27 describe any harm he suffered from the violation of his rights.

28 Any amended complaint will supersede the original pleading, *Lacey v. Maricopa County*,

1 693 F. 3d 896, 907 n.1 (9th Cir. 2012) (en banc), and it must be complete on its face without  
2 reference to the prior, superseded pleading, *see* E.D. Cal. Local Rule 220. Once an amended  
3 complaint is filed, the original pleading no longer serves any function in the case. Therefore, in  
4 an amended complaint, as in an original pleading, each claim and the involvement of each  
5 defendant must be sufficiently alleged. The amended complaint should be titled "First Amended  
6 Complaint," refer to the appropriate case number, and be an original signed under penalty of  
7 perjury.

8 Petitioner also may, at his option, voluntarily dismiss his habeas petition without prejudice  
9 to refiling his claims as a § 1983 civil rights action. If petitioner does not wish to convert his case  
10 or voluntarily dismiss his petition, his case will be subject to dismissal for lack of jurisdiction.  
11 Petitioner must respond to this order within ten days indicating whether he consents to  
12 conversion, wishes to voluntarily dismiss his petition, or intends to proceed with his original  
13 pleading.

14 **Order**

15 1. Within five days of the date of service of this order, respondent is required to respond  
16 to petitioner's request for a temporary restraining order. ECF No. 1. Petitioner may file a reply  
17 within five days of respondent's response.

18 2. Within ten days of the date of service of this order, petitioner is required to notify this  
19 court whether he wishes to proceed with his petition as filed, voluntarily dismiss his petition, or  
20 convert his case to seek relief under § 1983.

21 3. The clerk of court is directed to send petitioner a § 1983 form.

22  
23 IT IS SO ORDERED.

24 Dated: April 8, 2020

  
UNITED STATES MAGISTRATE JUDGE

26  
27 No. 206.  
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